20105 SERVICE DATE - November 27, 1996
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SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41513

GOLFER'S WAREHOUSE--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF TRANSCON LINES

Decided: November 15, 1996

This proceeding arises out of the efforts of the trustee in bankruptcy of Transcon Lines (Transcon or respondent), a former motor carrier, to collect undercharges based on common carrier tariffs for certain transportation services performed during 1987-1990 by Transcon for Golfer's Warehouse (Golfer's or petitioner). We find that the collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Accordingly, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter is before the Board on referral from the United States Bankruptcy Court, Central District of California, in Leonard L. Gumport, Chapter 7 Trustee of the Bankruptcy Estate of Transcon Lines v. Golfer's Warehouse, Case No. SB 93-22207 DN, Chapter 7, Adv. No. SB-93-02298 DN (referral order dated September 28, 1994). The court stayed the proceeding to enable referral of the issue of rate reasonableness to the ICC for determination.

Pursuant to the court order, petitioner, on December 27, 1994, filed a petition for declaratory order requesting the ICC to resolve issues of tariff applicability and rate reasonableness. By decision served January 9, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. On March 10, 1995, petitioner filed its opening statement in which it invoked the provisions of section 2(e) of the NRA. Respondent filed its reply on July 7, 1995. Petitioner submitted its rebuttal on July 27, 1995.

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to proceedings that were pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

Petitioner asserts that Transcon's efforts to collect the claimed undercharges constitute an unreasonable practice under section 2(e) of the NRA. Petitioner maintains that the written evidence it has submitted shows that Transcon offered a transportation rate upon which the petitioner relied in tendering shipments to Transcon, and that the offered rates were billed and collected by Transcon.

Respondent's statement consists of legal argument of counsel. Respondent maintains that petitioner has not proffered written proof that the rates negotiated had been agreed upon, i.e., written evidence of the original rate charged or that petitioner reasonably relied on this rate. Respondent also contends that section 2(e) of the NRA does not apply retroactively to pending claims such as those which are the subject of this proceeding.[2]

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the tariff applicability and rate reasonableness issues raised.[3]

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[2] With respect to the retroactive applicability of section 2(e), we point out that the courts have consistently held that section 2(e) by its own terms, and as more recently amended by the ICC Termination Act, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. See, e.g., Gold v. A.J. Hollander Co. (In re Maislin Indus.), 176 B.R. 436, 443-44 (Bankr. E.D. Mich. 1995); Jones Truck Lines, Inc. v. Scott Fetzer Co., 860 F. Supp. 1370, 1375-76 (E.D. Ark 1994); North Penn Transfer, Inc. v. Stationers Distributing Co, 174 B.R. 263 (N.D. Ill. 1994); Allen v. National Enquirer, 187 B.R. 29, 33 (Bankr. N.D. Ga. 1995); cf. Jones Truck Lines, Inc. v. Phoenix Products Co., 860 F. Supp. 1360 (W.D. Wisc. 1994).

[3] Although the issue of rate reasonableness was the only issue specifically identified by the court in its order of referral, the parties have directed their comments and arguments at the issue of unreasonable practice under section 2(e), an issue over which the Board clearly has primary jurisdiction. Because the matters raised in this proceeding can be resolved under the provisions of section 2(e), there is no point in engaging in a burdensome and time consuming rate reasonableness analysis. As a general rule, the Board may choose to decide cases on any grounds within its jurisdiction. Cf. Amoco Fabrics and Fibers Co. v. Max C. Pope, Trustee of the Estate of A.T.F. Trucking, No. 40526 (ICC served Feb. 26, 1992). Thus, we have jurisdiction to issue a ruling under section 2(e) here. The Ormond Shops, Inc., Thomas J. Lipton, Inc. and Lionel Leisure, Inc. v. Oneida Motor Freight, Inc. Debtor-in-Possession, and Delta Traffic Service, Inc., No. MC-C-30156 (ICC served Apr. 20, 1994); Have a Portion, Inc. v. Total Transportation, Inc., and Thomas F. Miller, Trustee of the Bankruptcy Estate of Total Transportation, Inc., No. 40640 (ICC served Feb. 7, 1995); and Gantrade Corporation--Petition For Declaratory Order--Certain Rates And Practices of Ritter Transportation, Inc., No. 40515 (ICC served May 8, 1995).

Section 2(e) was enacted essentially to resurrect the ICC's Negotiated Rates policy.[4] That policy was not intended to produce extended evidentiary inquiries or extended rate analyses to determine whether, in each instance, the negotiated rate, or the rate sought to be collected, was the applicable and/or reasonable rate. Rather, the focus of the Negotiated Rates policy was simply on whether the shipper and the carrier negotiated a rate on which the shipper relied, and whether the carrier now seeks to collect a rate that is higher than the agreed-to rate. Section 2(e), in our view, was designed not to complicate matters, but to resolve the undercharge crisis by holding a carrier to its bargain when it would be fair to do so. Requiring highly involved tariff analyses for every shipment before applying section 2(e) would not, in our view, advance the objectives of the NRA.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[5]

It is undisputed that Transcon no longer transports property.[6] Accordingly, we may proceed to determine whether the respondent's attempt to collect undercharges is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

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[4] See NITL--Pet. to Inst. Rule on Negotiated Motor Car. Rates, 3 I.C.C.2d 99 (1986) and 5 I.C.C.2d 623 (1989) (Negotiated Rates). The ICC's prior unreasonable practice policy was invalidated by the Supreme Court in Maislin Indus. v. Primary Steel, 497 U.S. 116 (1990).

[5] Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

[6] Transcon held both motor common and contract carrier operating authority, issued by the ICC under various sub-numbers of No. MC-110325. All of Transcon's operating authorities were revoked on September 21, 1990.

In E.A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994) (E.A. Miller), the ICC held that the original freight bills embodying the negotiated rate meet the "written evidence" standard of section 2(e). In Johnson Welding & Manufacturing Co. et al. v. Bankr. Estate of Murphy Motor Freight Lines, Inc., No. 40716 (ICC served May 9, 1995), the ICC explained that evidence of the existence of freight bills embodying the negotiated rate, sample freight bills, or some other contemporaneous writing evidencing the existence of a negotiated rate satisfies the section 2(e) standard.

Linda Ranaldi, Office Manager for Golfer's Warehouse, whose duties include supervising transportation arrangements for petitioner, testifies that Transcon was used to transport petitioner's products because the discounts offered by respondent made it one of the more competitive carriers. She states that, in tendering its traffic to Transcon, petitioner relied on the discounted rates quoted and billed by that carrier. She further states that in the absence of the originally agreed-to discounted rates which were billed by Transcon, petitioner would not have used Transcon's services. Ms. Ranaldi's statements are not challenged by respondent.

Attached as Exhibit B to petitioner's opening statement is a representative sample of balance due or revised freight bills provided to petitioner by Transcon. The representative sample consists of 11 freight bills relating to shipments transported between May 4, 1988, and March 16, 1990. These bills reflect the original amount billed by Transcon and paid by Golfer's, the interest and undercharge claimed, and the asserted balance due. An examination of the bills reveals the specific application of a 50% discount to the originally charged rate for 8 of the shipments, the specific application of a 15% discount to the originally charged rate for 1 shipment, and 2 shipments with no specifically applied discount in which the originally assessed billing rates are significantly below the rates originally charged in those freight bills where the 50% discount was applied. The revised freight bills eliminate all of the specifically applied discounts and, with respect to 4 of the bills, re-rate the originally assessed charges. We conclude that the representative freight bills confirm the testimony of Ms. Ranaldi with respect to the existence of agreed-to negotiated rates and satisfy the written evidence requirement of section 2(e).

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that a negotiated rate was offered by Transcon to Golfer's; that Golfer's tendered freight to Transcon in reliance on the negotiated rate; that the rate

negotiated was billed and collected by Transcon; and that Transcon now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Transcon to attempt to collect undercharges from Golfer's for transporting the shipments at issue in this proceeding.[7]

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on November 27, 1996.

3. A copy of this decision will be mailed to:

The Honorable David N. Naugle
United States Bankruptcy Court,
Central District of California
200 Federal Building
699 North Arrowhead Avenue
San Bernardino, CA 92401

Re: Case No. SB 93-22207 DN, Chapter 7
Adv. No. SB 93-02298 DN

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

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[7] Although the record here does not contain all of the freight bills for which respondent seeks undercharges, it does contain sample freight bills which appear to be representative of all of Transcon's undercharge claims. These freight bills constitute written evidence of a negotiated rate as to the specific shipments identified in the freight bills. The record also contains the uncontroverted testimony of Ms. Ranaldi as to petitioner's reliance on the originally negotiated rate. Transcon's general assertion that petitioner has not provided written evidence of the rate originally charged or of shipper's reliance on that rate clearly fails as to those shipments identified in the freight bills.

As to any other shipments with respect to which specific freight bills were not submitted, where the documentation is similar to that presented in the sample freight bills, it would be an unreasonable practice for Transcon "to attempt to recover the difference between the applicable tariff rate . . . and the negotiated rate." Accordingly, we advise the court of our legal opinion that, to the extent other undercharge demands follow the pattern outlined here, they too would constitute an unreasonable practice.